Petition

81-1599

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ADIBA MAHROOM,
Petitioner,

VS.

JOHN O. MARSH, JR., Secretary of
the Army of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does proof of an historic pattern of non-employment of female employees, coupled with proof of a stated policy of non-employment of Iraqi instructors, constitute a prima facie showing in a Title VII action?

2. May a United States government Arabic language instruction program, which teaches dialect recognition (listening sensitivity) rather than a dialect speaking capacity, categorically refuse to hire an Iraqi language instructor upon the rationale that such person was not a native speaker of the Syrian or Egyptian dialect, when the Iraqi instructor speaks fluent Modern Standard Arabic (MSA), is rated by the program as "highly qualified", and may easily acquire the ability to speak the Syrian or Egyptian dialect with "near-native" proficiency?

3. Is the United States government subject to the limitations expressed in *Diaz v. World Airways, Inc.* 142 F.2d 385 (5th Cir.) as these affect discrimination based upon a user agency's or customer's preference?

4. Does failure to cross-train an Iraqi female to speak an alternate Arabic dialect constitute discrimination on the basis of both national origin and sex, where Iraqi men were allowed such cross-training in dialect proficiency?

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PETITION FOR A WRIT OF CERTIORARI

PETITIONER'S SUPPORTING BRIEF

The Petitioner Adiba Mahroom respectfully petitions that this Court grant a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case, and reverse the determination of the United States District Court for the Northern District of California[1] in D.C. No. C-73-2295-LHB.

OPINIONS BELOW

The November 30, 1981 opinion of the United States Court of Appeal is set forth in the Appendix to this Petition for Writ of Certiorari[2] at page A-1. That opinion reviewed the determination of the United States District

[1]The United States Court of Appeals substituted Secretary Marsh as titular appellee for his predecessor, Clifford Alexander, pursuant to Fed. R. App. p. 43(c).

[2]Hereinafter "Petition".

Court for the Northern District of California, DC No. C-73-2295-LHB, which findings of fact and conclusions of law are set forth in the Appendix to this Petition at page A-3.

The United States Court of Appeal previously had heard an interlocutory appeal in this matter following the district court's denial of Petitioner's motion for leave to amend the complaint, and the district court's grant of a defense motion for summary judgment, dismissing the action. Petitioner had sought leave to amend her complaint to raise an additional allegation of discrimination. The appellate court held that dismissal was erroneous and remanded for a trial de novo in accord with *Chandler v. Routebush*, 425 U.S. 840, 48 L.Ed.2d 416, 96 S.Ct. 1949 (1976) but denied the motion to amend. That opinion is reported at 563 F.2d 1369 (Ninth Circuit, 1977). This court considered a Petition for Writ of Certiorari on the issue of the motion to amend. Certiorari was denied. 436 U.S. 904, 56 L.Ed.2d 402, 98 S.Ct. 2233 (1978).

JURISDICTION

Petitioner, an applicant for federal employment, brought suit against the Commandant of the Defense Language Institute (DLI) at Monterey, California, and the Secretary of the Army, principally under Title VII of the Equal Employment Opportunity Act of 1972[3] (42 U.S.C. § 2000e-16[c]) alleging employment discrimination upon the basis of both sex and national origin, and improper application of merit system principles.

Following an extended trial, the district court found that Petitioner failed to establish discrimination either on the ground of sex or on the ground of national origin and dis-

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[3]Title VII of the Equal Employment Opportunity Act of 1972, hereafter "Title VII".

missed the case. The appellate court, upon review, determined that Petitioner failed to establish a prima facie case showing the district court decision to be erroneous. This Petition is from these prior determinations.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

Section 1 . . .

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 2000e-16(c):

> ". . . on a complaint of discrimination based on race, color, religion, sex, or national origin . . . an employee or applicant for employment . . . may file a civil action as provided in Section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

STATEMENT OF THE CASE

Petitioner, a female nationalized citizen of Iraqi descent, had on three previous occasions been employed in a temporary capacity by the Department of the Army, at the Defense Language Institute[4] at Monterey, California. Petitioner's employment on each occasion was as an instructor in the Arabic language. Petitioner was rated as a "highly qualified" Arabic language applicant by the government agency. She had graduated from the Higher Teachers Training College in Baghdad, Iraq, and received a B.A. in Education. She had taught high school and junior college classes in Baghdad, Iraq. Petitioner attended the Uni-

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[4]The Defense Language Institute, hereafter "DLI," is an agency of the United States Government wherein government personnel are trained in various foreign languages, including the Arabic language.

versity of Southern California (USC) where she received a Master's Degree in Education. Petitioner was possessed of lifetime credentials as a junior college instructor in the State of California, and is qualified for the general secondary level of high school teaching in California.

Since 1960 Petitioner maintained on file at DLI an application for employment as an Arabic language instructor. Petitioner was rated by the DLI civilian personnel officer (C.P.O.) and a panel of three DLI language faculty members as highly qualified. In October of 1960 Petitioner was hired as a temporary instructor of Arabic; she worked as a temporary employee for ten months but was refused permanent employment. In 1966 Petitioner was again hired as a temporary instructor and worked for three months. At all times the language taught by all Arabic instructors at DLI was Modern Standard Arabic (MSA), which can be taught by any qualified Arabic-speaking language instructor. Petitioner was evaluated by her DLI supervisor, Dr. Daoud, regarding her language instructor skills, and was given a glowing and laudatory evaluation. This evaluation was introduced before the trial court as Plaintiff's Exhibit No. 16 and is reproduced in Appendix C, at page A-15.

Petitioner applied for appointment to one of eight positions at DLI which opened in 1973, but failed to obtain even so much as an interview. Petitioner filed a complaint alleging discrimination based upon sex and national origin.[5]

At the district court, Petitioner established the following uncontroverted facts concerning DLI's employment practices:

> —In 1977, DLI employed only two female instructors out of 50 instructors on its Arabic language faculty. The Arabic Department at times employed no

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[5]The appellate court upheld the district court's determination by concluding that Petitioner "did not identify her sex, her native origin, or a combination of the two as the likely reason for the denial of the job opportunity . . . ." (Appendix A, page A-2).

female instructors; at other times a few; at no time did female instructors comprise more than 10% of the Arabic faculty while in the other departments the ratio of female instructors to male instructors was 60% to 40%[6].

—In 1971, the DLI Arabic Department employed no female instructors even though 20% of the qualified Arabic instructor applicants were female[7].

—Male instructors at DLI were routinely granted permanent employment status following one, three, or six months of temporary employment, while female temporary employees, with two sole exceptions, were exclusively denied permanent employment status[8].

—Although an anti-nepotism policy at DLI was directed against the hiring of one spouse if the other was a supervisor or chairman of the Department, the policy was wrongly applied to Petitioner which prevented her from being hired or, if hired, from becoming a permanent instructor as Petitioner's husband, Mr. Mahroom, was neither a language department supervisor or chairman at DLI[9].

—Petitioner was rated as "highly qualified" and "best qualified" by the applicant evaluation panel in the DLI rating process, however, another instructor applicant who was rated as only "qualified" was selected in preference to her. This selection was extraordinary in that it ignored the standard criteria for applicant selection: "skills, knowledge, and abilities possessed by the candidates."[10]

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[6]District Court Reporter's transcript, pages 30, 100, 106, 149, 181, 195, 312, 313, 556, 665, 775, 838, 874, 907, 913, 915, 916.

[7]District Court Reporter's transcript, page 913.

[8]District Court Reporter's transcript, pages 30, 907, 909.

[9]District Court Reporter's transcript, pages 209, 210, 399.

[10]District Court Reporter's transcript, pages 672, 833; Plaintiff's trial exhibit 24a.

—No Arabic language instructor of Iraqi descent, however well qualified, was hired at DLI from 1963 to 1974, while less educated and less experienced Egyptian and Syrian instructors were hired.[11]

—Prior to 1973, the Arabic language Department taught only MSA. The standard 47 week course included over 1400 hours of language instruction of which approximately 25 hours were devoted to dialect familiarization. After 1973 a policy change purported to prefer Egyptian and Syrian dialects over the Iraqi dialect. This change was illusory, however, as dialect familiarization continued to require only 85 hours from a total of 1410 hours of language training. Further, the dialect familiarization portion of the Arabic language course is only given during the latter days of training, and is not taught throughout the language course. MSA, irrespective of dialect, is taught at DLI via standardized instruction textbooks. Instructors have historically been cross-trained in dialect familiarization. Nevertheless, DLI adopted an express policy which opposed the hiring of Iraqi instructors for the Arabic Language Department upon the pretext that such instructors could not provide dialect training. This erroneous dialect policy was later changed in 1975.[12]

—In the Arabic language department at DLI, Egyptian dialect speakers were assigned to teach the Syrian dialect, and Syrian dialect instructors were assigned to teach the Egyptian dialect. Nevertheless, an express policy of the Arabic language department required that no instructor of Iraqi descent be employed upon

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[11]District Court Reporter's transcript, pages 29, 98, 103, 177-190, 312, 313, 556, 874.

[12]District Court Reporter's transcript, pages 41, 42, 45, 100, 104, 105, 177-190, 199, 207, 216, 222, 255-56, 278, 304, 315, 400, 417-18, 421, 500, 656, 939.

the rationale that speakers of Iraqi dialect could teach neither the Egyptian nor Syrian dialects.[13]

—Petitioner was one candidate among four candidates who scored as "best qualified"; Petitioner was rated with the second highest score. In 1973 there were two vacancies at DLI for Arabic language instructors but two other applicants, not Petitioner, were offered appointments. When both declined, Petitioner still was not offered employment, but one other "best qualified," and one from the list of those who were only "qualified" were offered employment.[14]

The district court found in favor of the government. Petitioner appealed to the Ninth Circuit of the United States Court of Appeals. The appellate court found that the trial determination was not "clearly erroneous", and allowed that decision to stand.

REASONS WHY THE WRIT SHOULD BE GRANTED

A reading of the trial transcript, when one considers the pretextual nature of the dialect defense raised, shows that the trial determination was clearly erroneous. Each and every "reason" asserted in defense of the blatantly discriminatory conduct is full of exceptions. Native speakers of a dialect were chosen over non-native yet highly qualified speakers due to a government agency "preference". This dialect preference, however, was unique to the Arabic language program, and did not concern the government "user agencies" in other language programs such as Russian, German, or French. The testimony elicited at trial is rife with a negative, discriminatory tone toward Arabic women of Iraqi descent. The agency itself had a stated policy of non-employment of Iraqis. In addition, the actual conduct

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[13]District Court Reporter's transcript, pages 874-79, 882-83, 890.
[14]District Court Reporter's transcript, pages 337-38, 404, 441.

of the agency, shown not only by statistics but also by the agency's conduct involving Petitioner's prior temporary employment, demonstrates clear proof of an unjustified discrimination. The agency's conduct affected not only the Petitioner, but also other women applicants and even male Iraqis, as can be seen by the large number of complaints which have been filed against the DLI Arabic language program over the past decade. Petitioner's argument below compels the grant of the requested Writ.

The Determination of the Appellate Court Contains Two Fatal Defects. The Appellate Court Did Not Recognize That the Government's Policy of Hiring Language Instructor's Who Possessed Only a "Native" Proficiency in an Arabic Language Equated to a Discriminatory Limitation Based Solely Upon National Origin. The Appellate Court Further Concluded That Petitioner Failed to Identify Her or Native Origin as the Reason for Her Nonemployment. Both Determinations Were Clearly Erroneous

It was the claim of the DLI that non-native language instructors were incapable of adequately teaching dialect sensitivity.[15] The preference for native speakers of an

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[15]"Dialect sensitivity" was described at the trial court by witnesses for both sides. Mr. Shammas stated for the plaintiff,

> "In the dialect sensitivity, the student is exposed to a dialect to be familiar with it in hearing it or distinguishing it when he hear (sic) it and when the people conversing (sic), or when he hear a radio or listen, or with a television, there is a kind of knowledge that this dialect is in Iraqi or that dialect is Egyptian and Syrian and so forth, but it is not for speaking the dialect itself." (District Court Reporter's transcript, pages 43-44)

Mr. Leonard testified for the government, the "sole purpose is that of giving the students the flavor of the language, the culture, the do's and don'ts of the culture in which this particular language

Arabic dialect is discriminatory upon its face[16] and if not on its face, then in its implementation upon the rationale of *Griggs v. Duke Power*, 401 U.S. 431, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971). This government practice must be substantiated by some rational, objective criteria for it to be sanctioned by law.

An objective standard for rating dialect proficiency does exist. This standard was utilized by DLI when it cross-trained Iraqi male instructors in the Syrian and Egyptian dialects. The fourth level of that standard rating scale equates to "near-native" dialect speaking proficiency.[17] Such rating standard could well have been an element of the employment qualification process chosen by DLI, but it was not. Petitioner was nevertheless rated as "highest qualified" by the objective rating process chosen by DLI, yet she was not allowed an opportunity to compete for the open job position due to the arbitrary determination that she was not a "native speaker" of the Egyptian or Syrian

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is used. It amounts to little more than exposure, linguistic exposure to the given language." (District Court Reporter's transcript, page 552). Dialect training constituted only 6% of the Arabic language course. (District Court Reporter's transcript, pages 304, 350).

[16]This fundamental concept appears to have been lost by the trial court. At the district court hearing Judge Burke states from the bench,

> "Well, this isn't my first contact with D.L.I., and I know that in some areas where Mandarin, for example, is the desired Chinese dialect, the instructors are ordinarily ethnic Chinese, *for some rather obvious reasons*, although I assume there are many occidentals who could perhaps teach Mandarin with little or no difficulty, but the preference is given to ethnic Chinese." (emphasis added; District Court Reporter's transcript, pages 61-62).

Those "rather obvious reasons" are not at all clear, and the bias which is implicit in these remarks would make the trial court's determination erroneous.

[17]District Court Reporter's transcript, pages 617, 700.

dialects. The "native speaker" criteria had not been made a part of the rating process for had it been, Petitioner would not have been rated "highly qualified." The appellate court, as did the district court, failed to recognize the label "native speaker" to be a thinly disguised discriminatory classification based solely upon national origin. In this regard, the findings of both courts were clearly erroneous. *Marotta v. Usery*, 629 F.2d 615, 618 (9th Cir., 1980). (See conclusion #2, Appendix B, page A-13.)

A second fatal defect appeared when the appellate court determined that Petitioner "did not identify her sex, her native origin, or a combination of the two as the likely reason for the denial of the job opportunity." This determination is flawed for it fails to reconcile the trial court's findings with the transcript of the hearing. A cursory examination of that transcript reveals multiple instances when Petitioner's counsel articulated the issues of sex and national origin discrimination. The question of sexual discrimination was raised in the District Court Reporter's transcript at least at pages 17, 37, 62, 68, 80, 133, 139, 342, 375, 451-53, 483, and 500; the question of discrimination based upon national origin was raised in the District Court Reporter's transcript at least at pages 8, 37, 50, 61, 68, 95-6, 166, 316, 375, 483, 491, and 558. These references are made only by way of example as the thread of these allegations runs throughout the trial transcript.

In light of these extensive references to discriminatory conduct, the opinion of the appellate court becomes ludicrous, " . . . we conclude that [Petitioner] did not identify her sex, [or] her native origin, . . . as the likely reason for the denial of the job opportunity and thus failed to establish a prima facie case." (Appendix, page A-2) Petitioner asserts that a prima facie showing, as contemplated by *McDonnell Douglas Corporation v. Greene*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1873 (1973), was clearly made, and that any contrary determination is erroneous.

Petitioner Established a Prima Facie Case That Her Non-employment or Re-employment by the Defense Language Institute Was Based on Sexual and National Origin Discrimination

In *McDonnell Douglas Corporation v. Greene*, 411 U.S. 792, *supra*, this Court laid down the general rules for Title VII suits by individuals. That case involves racial discrimination, but this Court made it clear therein that the rule applies as well to sexual and national origin and other discrimination:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing: (1) that he belongs to a racial minority; (2) that he applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications he was rejected; and (4) that after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

We submit that the Petitioner here did comply with the rule by showing that: (1) Petitioner was discriminated against because of her sex and national origin; (2) she applied for and was qualified for the job that was offered by the Government; (3) she was rejected by the Government; and (4) the job remained open. The objective proof presented by Petitioner has established a prima facie case.

Petitioner did establish a prima facie case and the trial court's ruling to the contrary was in error and therefore a reversal is required. *Ramirez v. Sloss*, 615 F.2d 163 (5th Cir. 1980) is fully applicable here as to the requirements of a prima facie case. In *Ramirez*, a Mexican-American applied to the personnel officer of the City of Brownsville, Texas for a job as a common laborer. He was told that it

was the City's policy to hire only U.S. citizens and inquired as to Ramirez' citizenship. Plaintiff answered that he was not a citizen. According to the City, plaintiff became irate and boisterous and the denial of the plaintiff's employment was for non-discriminatory reasons, i.e., his attitude and actions. The trial court accepted this argument; however, the court of appeals reversed with the finding that the plaintiff has shown that the City had a written personnel policy favoring U.S. citizens. *Proof of this essential fact alone established a prima facie case*; Petitioner likewise established a prima facie case here because she has shown that there was a preference of not hiring females; that for a considerable length of time there was a rule not to hire Iraqis, and that no Iraqis, however well qualified, were hired from 1963 to 1974 while lower qualified Egyptians and Syrians were hired.[18]

With regard to the prima facie showing of sexual discrimination, the trial record established that only two of the females who were ever employed by DLI as Arabic language instructors were granted permanent status, while male instructors were granted permanent status as a matter of course.[19] As far as an historic pattern of conduct, the record shows that in 1960 there were no female instructors other than Petitioner, and that in the period from 1960 to 1979, for the most part, no female instructors were hired in the Arabic Department at DLI.[20] Evidence of pretext

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[18]District Court Reporter's transcript, pages 29, 98, 103, 312, 313, 556, 874.

[19]District Court Reporter's transcript, pages 30, 907, 909.

[20]For the greater period of time from 1960 to 1979 no female Arabic instructors were hired at DLI, and at no time did more than three female temporary instructors work in the department. District Court Reporter's transcript, pages 29, 30, 98, 103, 145, 312-13, 556, 874, 915.

may be statistical. *Teamsters v. United States*, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). The statistical facts alone clearly establish a prima facie case following the holding of *Ramirez, supra*, and the rationale of *McDonnell Douglas, supra*.

Following Establishment of a Prima Facie Case Showing Discrimination, the Burden Thereafter Shifts and the Government Must Articulate Some Legitimate, Non-Discriminatory Reason for Its Conduct. The Trial Court Did Not Consider This Shift of Burden, Therefore a Reversal Is Required

The Government claimed a non-discriminatory reason for its rejection and non-consideration of Petitioner's application for employment by referring to the so-called demand of "user agencies" for instruction in Arabic dialects other than Iraqi. This attempt was not successful because uncontradicted testimony disclosed that prior to 1975 and throughout the 1960's the only dialect instruction pertained to sensitivity training during the last few weeks of the 47-week school period; a mere 6% of the Arabic language course. Prior to 1971 DLI's Arabic Department taught only MSA,[21] [22] and not Arabic dialect.

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[21]District Court Reporter's transcript, pages 20, 41, 42, 304, 400, 421, 837, 936.

[22]The Government's linguistic expert, Dr. Ferguson, testified extensively before the District Court about "diglossia" which is claimed to distinguish the Arabic language from most other languages in that the written Arabic is different from that of colloquial or spoken Arabic. He explained:

> "Governmental agencies and universities find Arabic one of the really difficult languages to cope with pedagogically." (District Court Reporter's transcript, page 597.)

If that is true, it is hard to imagine how good soldiers coming from Iowa, Brooklyn, Texas or Georgia to DLI in Monterey, California learn Arabic and cope, not only with the difficult written language, but also with one of the Arabic dialects. Common sense

The Government asserted a second defense before the trial court: that of "customers' preference" of the user agencies. In other words, the Government agencies that sent students to DLI to learn a language ostensibly demanded that Egyptian and Syrian dialect be taught by native speakers of that dialect. A Government witness admitted to the user agencies' demand that preference be

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teaches us that one cannot reconcile the practices of DLI with the position articulated before the trial court. The claim regarding the difficulty in teaching Egyptian and Syrian dialects would appear to be pretextual.

Dr. Ferguson, continued to identify a trial exhibit as a device to assist an individual in becoming familiar with an alternate dialect:

> "Very often an American student studies one variety of Arabic, let us say that it is just Modern Standard (sic) or he studies just Egyptian colloquial and then it turns out that he needs to go to some other part of the Arab world and he needs some other kind of Arabic; so what we did in these little few pages here was to pick out about, as I remember, 200 maybe of the very common words which differ in—in the four major dialects and modern standard." (District Court Reporter's transcript, page 592.)

The practice which is implicit in Dr. Ferguson's testimony clearly indicates the frailty of the position taken by the Government: that only native speakers can adequately convey an Arabic dialect. Dr. Ferguson also testified that there is a slight difference in English between the spoken and the written form. According to Dr. Ferguson, educated Arabs do not distinguish between Modern Standard Arabic (MSA) and dialect as, does DLI. He said that,

> "Arabs tend to belittle the dialect differences, so that they tend to insist, quite rightly, from their point of view, that Arabic is one language and you must not split it up and talk as though it were half a dozen different languages; there is one Arab nation, one Arab language and so on . . .". (District Court Reporter's transcript, page 600.)

This contention is further proved in that DLI hired Dr. Brown, a good American soldier who had learned the Arabic language at DLI from Iraqi instructors, to supervise the Arabic department ***and to teach the Arabic language!***

given to native Egyptian and Syrian speakers.[23] It is submitted that *the preference of Government user agencies is not a bona fide occupational qualification* (B.F.O.Q.) as that term is construed in *Diaz v. World Airways, Inc.*, 142 F.2d 385 (5th Cir.), which case pertains to the preference of commercial airlines for female flight attendants instead of male attendants because of the claimed psychological needs of passengers who were anxious due to the stress involved in flying, and were desirous of assurance and security "that female attendants could best supply." A psychiatrist testified that stewardesses were better able psychologically to deal with apprehension, boredom, and excitement. The court of appeals held that,

> "The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide . . . may all be important they are tangential to the essence of the business involved." (Pg. 388).

As in the *Diaz* case, so here, the claim of the Government is tangential to the main function of DLI to teach Arabic (MSA) and not the cosmetic effect of employing native speakers to give students from 25 to 85 hours of dialect sensitivity out of 1410 hours of language training. As MSA may be taught by any qualified Arabic language instructor, the dialect "defense" ought not be accepted as a bona fide occupational qualification.

In the airline case there was evidence of an independent survey showing 79% of the passengers preferred females as attendants; the stewardesses were preferred by 85% of the male and 65% of the female passengers, while stewards were preferred by only 2% of the male and 5% of the female passengers. In the case at bar, it is claimed

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[23]District Court Reporter's transcript, pages 547, 559, 564, 570-71.

by the Government that the user agencies, who are their "customers", preferred the teaching of Egyptian and Syrian dialect by native speakers as against persons who are capable of teaching dialect at a "near-native" proficiency. The EOC guidelines state that a bona fide occupational qualification ought not to be based on,

> ". . . the refusal of hiring an individual because of the preference of co-workers, clients or customers . . ." (29 C.F.R. § 1604, l[iii]).

This Court has established the general proposition that "The administrative interpretation of the Act by the enforcing agency is entitled to great deference". *Griggs v. Duke Power Co.,* 401 U.S. 424, 28 L.Ed. 2d 158, 91 S.Ct. 849; *United States v. Chicago,* 400 U.S. 8 27 L.Ed.2d 9, 91 S.Ct. 18 (1970); *Udall v. Tallman,* 380 U.S. 1, 13 L. Ed. 2d 616, 85 S.Ct. 792 (1965).

The Court of Appeals in *Diaz, supra,* went on to state,

> "While we recognize that the public expectation of finding one sex in a particular role may cause some initial difficulty, *it would be totally anamolous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.* Indeed, it was, to a large extent, these very prejudices that were meant to be overcome. Thus, we feel that personal preference may be taken into account only when it is based on the company's inability to perform the primary function of service it offers." (emphasis added).

It would be just as anamolous to accept the claim that preferring native Syrian and Egyptian speakers of dialect to that of Iraqi speakers makes it possible for DLI to teach Arabic when for about 15 years the institute existed without the teaching of such dialects. Furthermore, after a change in the position of Department Chairman, DLI disposed of the policy which precluded the hiring of Iraqi

instructors and restored the hiring policy based on ability and skill as well as experience. The *Diaz* case states that,

> "We begin with the proposition that the use of the word 'necessary' in Section 703(e) requires that we apply business *necessity* tests, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."

The Government totally failed to articulate "some legitimate, non-discriminatory" reason for Petitioner's rejection from employment.[24] No. B.F.O.Q. was established to justify the DLI employment policy.

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[24]At the trial, the government attempted to show that Petitioner was not a competent teacher. For that purpose supervisor Daoud testified that he was lying when he wrote Plaintiff's Exhibit No. 16, a letter addressed to the Dean of the Foreign Language Institute in Monterey, Dr. Sampson Knoll, and *recommended Petitioner highly as a very competent teacher.* The full text of this letter is reproduced in Appendix C at page A-15. He stated that he lied in that letter when he wrote that Petitioner was a very competent teacher. He admitted that he rated Petitioner satisfactory in 1960 and in 1966; he admitted that she was a competent graduate of the Baghdad Higher Teachers Training College and that she was well trained and well qualified.

Another weak attempt to show Petitioner not to be a qualified teacher concerned Petitioner's ability to teach Egyptian and Syrian dialect; however, Government witness Daoud testified that all male Iraqi teachers were given the opportunity to be cross-trained and all in fact acquired sufficient knowledge to teach Egyptian and Syrian in addition to their own native Iraqi dialect. Petitioner was denied this opportunity ostensibly because she was not a permanent employee. *She was not granted permanent status, however, because she was a female and females rarely, if ever, were given permanent employment in the Arabic language department at DLI.* (District Court Reporter's transcript, pages 30, 199, 307, 907, 909.) These attempted defenses ought not to be found to be a B.F.O.Q.

It is submitted that maintaining the equal employment opportunities for both sexes and for every national origin would not undermine the operation of DLI. It is not amiss to point out that giving preference to customers' desires, as the Government suggested, would negate the whole of the civil rights legislation.

The Non-employment or Non-reemployment of Petitioner Was Pretextual and Therefore a Reversal Is Required

The trial court failed to understand that in a department where the chair person is an Iraqi, and where two of the four supervisors are Iraqis[25] there nevertheless was discrimination against an Iraqi female. A number of witnesses, among them the chairman of the Department, testified that the Arabic culture does not provide opportunities for its females to the same extent as the United States. Further testimony gave clear indication that Iraqi men in charge of the Department, either as chairpersons or as supervisors, would be opposed to women even though from Iraq.

Mr. Daoud testified that in the Arab world,

> ". . . women are less employed than men are. The main thing in the woman is at home, especially Islamic world. (sic) In the very orthodox Christian world, it is about the same thing but there are women now going—having different jobs, but not as much as men. It is very limited."[26]

It seems that men of the Arabic world, and particularly Chairman Sa'id, a practicing Moslem who went to Mecca to carry out his religious duty, carried these Moslem religions tenets with them to this country.[27] However, that issue is tangential. The fact is that discrimination was

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[25]District Court Reporter's transcript, pages 948-49.

[26]District Court Reporter's transcript, page 921.

[27]District Court Reporter's transcript, page 454.

practiced against Petitioner because of her sex, because of her Iraqi nationality, and particularly because she was an Iraqi female. All the defenses submitted were clearly pretextual. The claim that Petitioner was not employable because she was not able to teach Egyptian and Syrian dialect foundered especially in that DLI did hire Dr. John Brown, *an American-born former military man, who studied Arabic at DLI under Iraqi teachers, who had no native capability in any dialect, and who had never taught Arabic at DLI or anywhere else.*[28] Dr. Brown not only taught Arabic but also supervised other teachers. Petitioner, an Arabic-born woman, however, was found not to be qualified even for an interview.

The dialect issue was a further pretext as the same books of instruction were used for all the sections, irrespective of dialect; Egyptian instructors were assigned to teach dialect classes in Syrian, while native Syrian instructors were assigned to teach the Egyptian dialect; cross-trained Iraqi instructors in fact were assigned to teach both Egyptian and Syrian dialects.[29] The dialect defense raised by the Government was a sham.

It Was an Error for the District Court—in the Case of an Iraqi Female Charging Discrimination—to Fail to Address the Claim on the Basis of Both National Origin and Sex. The Trial Court Further Erred When It Disregarded Teachings of the Leading Civil Rights Cases

It is submitted that *discrimination against an Iraqi female can exist, even in the absence of discrimination against Iraqi men or non-Iraqi women.* An employer may not escape liability for discrimination merely through non-discrimination against Iraqi males and not discriminating

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[28]District Court Reporter's transcript, pages 45, 125, 216, 222, 815.

[29]District Court Reporter's transcript, pages 104, 874-79, 882-83, 890, 907.

against non-Iraqi females. See *Jefferies v. Harris County Community Action Association, et al.*, 615 F.2d 1925 (5th Cir. 1980). As in *Jefferies, supra*, so here, undisputed testimony established that the permanent position for which Petitioner applied had been filled by males, some of them Iraqis, and seldom by females. She was never told—until she filed her complaint—as Jefferies was not told, that she was unqualified for any of these positions. In fact, the Government's own witness testified that he gave her, on the basis of classroom visits, satisfactory performance for both of her employment years. As it was said in *Jefferies, supra*, the claim of discrimination based on national origin and sex discrimination and discrimination based on both national origin and sex were properly raised in the pleadings and at trial. *The trial court failed to consider the double-barreled discrimination as claimed by Petitioner.* Petitioner established a prima facie case of both sex discrimination and discrimination based on national origin. Therefore, the government had the burden of articulating a legitimate, non-discriminatory reason for her non-employment. However,

> ". . . 'articulating' a legitimate reason involves more than merely stating fictitious reasons; legally sufficient proof is needed before the trier of fact can find plaintiff's proof rebutted." *Jefferies, supra.*

What was said in *Jefferies, supra*, applies here, that the Government,

> ". . . must prove that those he hired or promoted were somehow better qualified than was plaintiff; in other words, comparative evidence is needed. An assertion, for example, that plaintiff had a poor work history will not suffice unless defendant can show by comparative factual data that those hired or promoted had a better work history."

This was not done and therefore the prima facie case stands unrebutted. A reversal is required since the district court in no way addressed the issue of comparative qualification. Further, the trial court erred because it made no finding concerning Petitioner's claim of discrimination based on a combination of national origin and sex. The *Jefferies* case, *supra,* applies here when it was stated that,

> "The essence of Jefferies' argument is that . . . discrimination against black females can exist even in the absence of discrimination against black men or white women."

The *Jefferies* case also held that,

> "Equal employment opportunity may be secured only when Employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin . . ."

As shown heretofore, the "defenses" of the Government were pretextual and in consequence the holding in *Griggs v. Duke Power Co.,* 401 U.S. 424, 431, 28 L.Ed.2d 158, 91 S.Ct. 849, is fully applicable here. The trial court failed to apply the teachings of that case as it failed to apply the teachings of other leading cases and the progeny of *Griggs,* and therefore, a reversal is required.

Blake v. City of Los Angeles, 595 F.2d 1367, (Ninth Circuit, 1979), held, as in *Griggs, supra,* that,

> "A prima facie Title VII violation can be established by the mere showing of disproportionate impact of an employment practice on a group protected by Title VII."

Here, there was a disproportionate impact on the employment of Iraqi females in the Arabic Department at DLI and therefore, Title VII was violated as the prima facie

case shows. This court held, in *Dothard v. Rawlinson*, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct. 2720 (1977),

> "A prima facie case of sex discrimination was established from national census statistics showing that a 5'2" height requirement disproportionately excluded women from positions as Alabama Correctional Counselors."

Dothard leaves no doubt that

> "A showing of disproportionate impact is all that is required to establish a prima facie case of discrimination whether it be racial or sexual discrimination."

Both *Dothard, supra*, and *Blake, supra*, hold that superficial standards which have an erroneous appearance of neutrality are contrary to law where the selected applicants demonstrate a discriminatory pattern. Such is the circumstance in this case.

In *Blake, supra*, there was an argument to the effect that the number of females who applied for the position was less than the number of men. As to that, this Court said,

> "Appellees argued that the disproportionate exclusion of women was not as bad as it looked from the statistics because fewer women than men were interested in police work. The contention is not relevant. The challenged qualifications disproportionately excluded women who were interested enough to apply. Moreover . . . the disinterest itself may be traceable to the Police Department's use of selection devices that would disproportionately exclude women. As the Supreme Court observed in *Dothard:* '. . . otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the the very standards challenged as being discriminatory.'"

The evidence here shows that it was common knowledge at DLI that women were scarcely ever employed and seldom given permanent jobs in the Arabic Department; there was a time when the Department was exclusively manned by male instructors. In consequence, the *Dothard* reasoning is fully applicable.

An attempt was made in the instant case by the Government, as in *Blake*, to show business necessity; however, as this Court has stated in *Albemarle v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975):

> "Even if an employer meets his burden of demonstrating business necessity, Title VII plaintiffs may prevail if they show that alternative selection devices are available that would serve the employer's legitimate interests without discriminatory effects."

In the case at bar, the Government itself has shown that there were devices available which would serve DLI's legitimate interests without discriminatory affect when it changed its policy of exclusion of Iraqi nationals. It was also proved by the DLI when that school allowed that dialect be taught by cross-trained Iraqi instructors, even though they were not natives of Egypt or Syria and that Iraqis so cross-trained were permitted to teach Egyptian and Syrian dialects, and vice versa. It was further shown when native Syrian and Egyptian speakers, despite their lack of cross-training, were allowed to instruct classes in alternate dialects.

The Appellate Court Failed to Consider the Comments of the Trial Judge Which Reveal the Erroneous Nature of the District Court Decision

Judge Burke considered the matter at the original hearing, and dismissed the case on a motion for summary judgment. That holding was reversed in the decision reported

at 563 F.2d 1369, and the matter was remanded for a full hearing. Judge Burke continued to hear the matter, despite his failure to contemplate the import of the appellate determination. He states on the record, following a second defense motion for summary judgment,

> "Well, then, let's take it under submission and complete the record that apparently was contemplated by the court of appeals in an opinion which I still don't understand."[30]

The holding of the appellate court most definitely did not contemplate a mechanical "completion of the record" as stated by Judge Burke. The remand was for a full hearing, not to "complete the record"! This statement of the trial Judge, by and of itself, indicates less than a fair hearing, shows the final determination to be clearly erroneous, and compels the grant of the requested Writ.

The bias held by Judge Burke was noted earlier in this Petition in a quote set forth at footnote 16 wherein a reference was made to the *obvious advantages of ethnic Chinese language instructors over non-ethnic instructors.* The trial Judge also evidenced a profound and unwarranted deference to the Government,

> "However, I don't believe that Title VII was designed to ensure complete fairness in every decision made in every business. Nothing in life is entirely fair.
>
> The intrusion of a Court upon the internal management of a school of this size and nature should not be lightly undertaken."[31]

This bias and predisposition was compounded by the Judge's view towards "nepotism"; Judge Burke espoused a

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[30]District Court Reporter's transcript, pages 514-515.

[31]District Court Reporter's transcript, page 1007.

position which transcended the extant policies of DLI[32] and which indicated a further bias based upon sex. These state-

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[32]The Court: Well, maybe I'm thinking out loud, counsel. But you get a husband and wife team in the same department, the husband applies for a job as supervisor and says—and perhaps can prove that he's better qualified than anyone else to be a supervisor; and yet if he is appointed as a supervisor, the school is placed in the awkward position of having a supervisor supervising his own wife, not a healthy condition.

Mr. Weingarten:

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The Court: Well, I don't know. Some 20 odd years ago I was United States Attorney in this district and my next-door neighbor Judge Schnacke was in the office. He married one of the assistants and as a matter of fact I was the best man at the wedding. I told them that one of them had to leave.

Mr. Weingarten: But you didn't tell them which one had to leave?

The Court: No. It seemed rather apparent that—

Mr. Weingarten:

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The Court: Well, had Mrs. Schnacke been employed before she married Judge Schnacke I would have had the same difficult decision to make.

Mr. Weingarten: Right. I think—

The Court: It's more sense to the idea of not having a husband and wife in close proximity in the same environment than you urge.

Mr. Weingarten: Of course, the situation in a teaching situation is perhaps somewhat different. You have independent people who are working with classes. They may be in the same place. It's a very common thing in public schools to have husbands and wives working in the same school. There is no such prohibition there. They have their own classes. They can teach at different levels or at the same level. They aren't necessarily teaching the same students. And so that the—something where there is a strong thing in favor of not having an appearance of favoritism in selection may not extend to the teaching situation.

The Court: Now you're getting into my area. There aren't too many husbands and wives teaching in the same school. And your

ments from the Bench, taken in the aggregate, reveal a bias which denied Petitioner a fair hearing, and reveal the trial determination to be clearly erroneous.

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entire theory in this case is inconsistent with the practice which applies pretty generally in most school systems and that is to make probationary appointments and terminate them at the end of about two and a half or so years to avoid the necessity of applying tenure inasmuch as the budgetary potential is never certain and the faculty needs are never clearly defined.

Four members of my family have general secondaries they've been talking about; and a master's degree in education in Alameda County at least is required if you wish to go into any kind of an administrative position. But this probationary bit without giving permanent status is neither new nor unique nor without reason.

Mr. Weingarten: Your honor, I certainly recognize that that is true, that it is not new, it is not unique nor is it without reason where used.

I think one of the issues here is whether the reasons—if they are budgetary reasons, they really don't apply because budgetary reasons cut a broad—you don't distinguish on budgetary reasons between men and women. It doesn't distinguish between husbands and wives.

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One, it violates the '72 act provisions as they apply now, and, secondly, it violates their own anti-nepotism rule because their own anti-nepotism of a supervisor or someone in the higher echelon that the position of a supervisor or someone in the higher echelon that has discretionary power. It does not go to the matter of someone who is merely an employee. . . .

The Court: But isn't the policy that you're criticizing somewhat anticipatory?

For example, when I went on this court, Judge Schnacke became the U. S. Attorney. That would mean that he would be supervising his wife had she not left.

Mr. Weingarten:

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The Court: Well, the statute has run on whatever I did anyway, so . . .

[District Court Reporter's transcript, excerpts, pages 448-453]

CONCLUSION

Petitioner established a prima facie case of discrimination based on her sex and on her national origin. Evidence before the trial court showed that Mr. Sa'id, Chairman of the Arabic Department, had been told *"not to hire Iraqis because of the number already on the rolls"!* [Trial Exhibit #3] Further evidence showed that the DLI had previously hired female Arabic language instructors in a temporary status, while at the same time selecting less qualified male instructors for permanent status. Petitioner also complied with the *McDonnell Douglas* rule and proved that she was fully qualified to do the job for which she applied; that notwithstanding, she was refused to be employed; and that subsequently other people, though less qualified, were hired for the same position for which she applied. Because the trial court failed to find that the Petitioner established a prima facie case; because the trial Judge failed to follow, or by his own admission understand the intent of the appellate court on remand, because the trial court failed to find that the defenses of the Government were pretextual and could not be considered a Bona Fide Occupational Qualification (B.F.O.Q.); because it failed to make a finding about the double-barreled discrimination based on sex and national origin, the Petition herein should be granted.

Each of the Government's "defenses" to Petitioner's prima facie case fails upon reflection. The contention regarding customer preference violates the principle enunciated by *Diaz, supra.* The contention that the need for native dialect speakers is a bona fide occupational qualification fails in that such a qualification was not made a part of the objective applicant rating process used by the government agency, and the agency itself chose to ignore its native speaker "rule" in hiring the Arabic language department Chairman, Dr. Brown, a good government

soldier. DLI contended that Petitioner was denied the alternate dialect cross-training which had been allowed male Arabic instructors at DLI because Petitioner was not a permanent DLI employee at the time cross-training was offered. This contention fails, however, as Petitioner was a temporary DLI language instructor *at that time*, but was also a female, and females rarely, if ever, were given permanent employment in the Arabic language department at DLI. The "defense" of nepotism, finally, fails in that such policy had no application to Petitioner, whose husband was employed at DLI only as an instructor. Judge Burke's comments notwithstanding, the DLI nepotism policy only affects the familial employment affecting a department supervisor or a department chairman. Petitioner's husband was neither.

The appellate court failed to recognize the pretextual defenses raised by the Government. Further, the appellate court failed to adequately focus upon the prejudicial comments and conduct of the trial Judge. Accordingly, this Petition should be granted, affording a full review of the matter which lies before this Honorable Court.

Dated: February, 1982

Respectfully submitted,

De Lay, Laredo & McGowan

David C. Laredo
Counsel for Petitioner

(Appendices follow)

Appendix

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

No. 80-4091
D.C. No. C-73-2295-LHB

Adiba Mahroom,
Plaintiff-Appellant,

v.

John O. Marsh, Jr.,* Secretary
of the Army of the United States,
Defendant-Appellee.

[Filed Nov. 30, 1981]

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California

Lloyd H. Burke, District Judge, Presiding
Argued and Submitted August 13, 1981

Before: WRIGHT, CHOY, and BOOCHEVER, Circuit Judges.

Adiba Mahroom appeals from a district court judgment against her claim that the Defense Language Institute (DLI) discriminated against her because of her sex and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e-16. We affirm.

*Secretary Marsh is substituted as titular appellee for his predecessor, Clifford Alexander, pursuant to Fed. R. App. P. 43(c).

Mahroom claims that prejudice against her status as a female and an Iraqi motivated DLI when it did not appoint her to a temporary position as an instructor in 1973. The district court found that she was not hired primarily because she lacked native proficiency in either the Egyptian or Syrian dialects, the skills sought by DLI at that time. Surrounding circumstances, including the facts that the Chairman of the Arabic Department was an Iraqi and that two of the four instructors hired when Mahroom was rejected were women, supported the court's decision to discount the allegations of discrimination. We cannot conclude that the district court's findings were clearly erroneous. *See Marotta v. Usery*, 629 F.2d 615, 618 (9th Cir. 1980).

The district court failed to identify whether its conclusion was grounded in Mahroom's failure to establish a prima facie case or in DLI's presentation of a legitimate nondiscriminatory reason for refusing to hire her. *See McDonell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). From the district court's findings of fact, we conclude that Mahroom did not identify her sex, her native origin, or a combination of the two as the likely reason for the denial of the job opportunity, and thus failed to establish a prima facie case. *See White v. City of San Diego*, 605 F.2d 455, 458 (9th Cir. 1979).

AFFIRMED.

APPENDIX B

United States District Court
Northern District of California

Civil No. C-73-2295-LHB

Adiba Mahroom,
Plaintiff,

v.

Clifford Alexander, Secretary of the Army,
Defendant.

[Filed Dec. 21, 1979]

Defendant's Revised Findings
of Fact and Conclusions of Law

FINDINGS OF FACT

This action having come on for trial before the Court, evidence having been presented, the Court having duly considered all evidence, arguments and memoranda, and the matter having been submitted for decision, the Court makes the following findings:

A. *Background*

1. Plaintiff is a woman of Iraqi national origin.

2. The Defense Language Institute (hereinafter DLI) is the branch of the Department of the Army responsible for the conduct, supervision, and technical control of foreign language training in the Department of Defense. DLI students include, primarily, intelligence and diplo-

matic personnel from the various branches of the armed services. DLI is located at the Presidio of Monterey, California.

3. DLI has had plaintiff's application for Arabic instructor on file since 1960.

4. Plaintiff meets the minimum published qualifications for employment as an Arabic instructior at DLI in terms of education, experience, and proficiency in Modern Standard Arabic (MSA). Thus, plaintiff is "qualified" for competitive consideration.

5. Between approximately 1969 and 1974, in addition to its normal minimum educational and experience requirements, the Arabic Department preferred for employment instructor applicants with native level proficiency in Egyptian and/or Syrian dialect. Plaintiff concedes that she was not and is not proficient in either of those dialects. She possesses native level proficiency in only the Iraqi dialect.

6. DLI's Arabic Department normally hires instructors on a temporary basis initially. Temporary instructors may or may not be offered permanent employment, depending on their performance and the department's needs.

7. DLI has employed plaintiff as an Arabic instructor on a temporary basis three times: for approximately 10 months in 1960; for approximately 3 months in 1966; and from September 1978 through April 1979. During such times her performance was "barely satisfactory," and she was not converted to permanent status.

8. The instant action was initiated when, between June 11-20, 1973, the Arabic department filled four 6-month temporary instructor positions. Pursuant to the then-existing hiring requirements, all four appointments went to persons with native level proficiency in the Egyptian dialect. Two of the persons hired were men; and two were women. Plaintiff was not considered for these appointments because of her [illegible] lack of native proficiency in the Egyptian [illegible]

9. On July 27, 1973, plaintiff filed a formal equal employment opportunity administrative charge alleging that defendants' failure to hire her for one of the four 6-month temporary positions was based on her sex and/or national origin.

10. On August 6, 1973, the agency determined that it had not discriminated against plaintiff with respect to her sex and/or national origin. The agency's denial of her claim was sustained by the United States Civil Service Commission Appeals Review Board on November 19, 1973.

11. Plaintiff filed the instant action on December 20, 1973 seeking review of the agency's denial. An eight-day trial *de novo* was held during May 1979; final arguments were heard June 21, 1979.[1]

B. *National Origin Claims*

12. DLI's Arabic department offers instruction in speaking, reading, writing, and comprehending Arabic.

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[1]Various procedural issues were litigated during intervening years, as set forth in *Mahroom v. Hook*, 563 F.2d 1369 (C.A. 9, 1977) *cert. denied*, 436 U.S. 904.

Many students concentrate on developing simultaneous translation skills.

13. All students receive instruction in Modern Standard Arabic, or MSA, the classical, formal language which has achieved some measure of standardization throughout the Arab world. Virtually all students also receive instruction in one of four Arabic dialects, Egyptian, Syrian, Saudi, or Iraqi. The dialect is the informal, conversational form of Arabic which differs greatly from area to area within the Arab world.

14. "User agencies" within the Department of Defense dictate to DLI the dialect their personnel are to be taught (hereinafter the "target" dialect). Throughout the mid-1960's, most students were targeted to learn the Iraqi dialect, and consequently the Department has historically employed mostly Iraqis with native proficiency in Iraqi dialect. Beginning in the 1960's, however, the user agencies' emphasis shifted to Egyptian and Syrian dialect instruction, and for many years there have been almost no students designated for Iraqi dialect instruction.

15. The basic Arabic course is 46 weeks long. The dialect portion of the course has received increasing emphasis over the years. During the early 1970's dialect was taught approximately one hour per day during the final few weeks of the course. Today, however, the dialect portion of the course consumes the bulk of the final 10 weeks. During the 10-week dialect section dialect is taught for approximately four hours per day, during which time students listen to tapes and engaged in conversation in dialect with their instructors.

16. Since at least 1970 DLI has received considerable pressure from user agencies, primarily the National Security Agency (hereinafter NSA), which has direct or indirect responsibility for approximately 80% of DLI's Arabic students, to increase its emphasis on dialect instruction. NSA has stressed that the dialect course should be taught by instructors with native level proficiency in the target dialect, based on NSA's belief that only dialect instructors with native proficiency can adequately teach the dialect course. NSA has also encouraged DLI to assign MSA instructors with native proficiency in the dialect for which a particular class is targeted. Again, this request was based on NSA's belief in the pedagogical soundness of such an assignment practice.

17. NSA's judgment in this respect is supported by the testimony at trial of Dr. Charles Ferguson, an expert in Arabic linguistics and pedagogy who has had many years of experience setting up schools and curriculums in Arabic instruction.

a. According to Dr. Ferguson, Arabic is the only major world language characterized by diglossia. That is, to an Arabic speaker there are actually two separate languages, one formal and one informal. The formal language is now generally called MSA (a term originally coined by Dr. Ferguson). MSA is used in prepared speeches and for formal occasions. The informal language is the colloquial dialect. Dialect is used on informal occasions, among friends and family, and for informal business conversations.

b. The dialects differ greatly in terms of vocabulary and pronunciation. They are, however, broadly divisible into five separate geographic dialect groups: Iraqi, Syrian, Egyptian, Saudi, and Maghrebi. Even within a particular dialect group, however, there are differences in the spoken dialect from place to place. However, these differences are not as great as the differences among the five broad classes of Arabic dialects. The closest analog in English to the differences among Arabic dialects would be the difference between English spoken in the mid-west United States and the way it is spoken in some of the more remote areas of Scotland. At times the dialects are mutually incomprehensive.

c. There are also substantial differences in the way MSA is spoken in various parts of the Arab world. For example, there is a major difference in pronunciation between the way MSA is spoken in Egypt and the way it is spoken in most other Arab countries.

d. Additionally, Arabs who attempt to speak MSA slide into the dialect at times. Thus, in order fully to comprehend the MSA spoken in a particular Arab country, it is necessary to understand the dialect of that country. The more informal or emotional the conversation, the greater will be the speaker's tendancy to slide between MSA and his or her native dialect.

e. In view of the above, it was Dr. Ferguson's expert opinion that the dialect portions of DLI courses should be taught by persons with native proficiency in the students' target dialect. In Dr. Ferguson's experience, while non-natives could be taught various Arabic dialects, it

was an extremely rare individual who could through instruction achieve native proficiency in an Arabic dialect. Dr. Ferguson himself knew of only one non-native who in his view had achieved native proficiency through instruction in an Arabic dialect.

f. It was also Dr. Ferguson's expert opinion that the MSA portion of DLI's course could best be taught by an individual with native proficiency in the students' target dialect. He based his opinion on the fact that MSA instruction would of necessity contain certain elements of dialect and if students were taught by a non-native they could pick up "bad habits" which they would have to unlearn later in the dialect portion of the course. He also based his opinion on the fact that there are significant differences in the way MSA is spoken from country to country.

18. User agency requirements regarding dialect instruction at DLI are based ultimately on national security considerations. As explained by Jack Leonard, an NSA representative and Arabic expert, in the field DLI graduates are required to do precision simultaneous translations. As an example of the extreme importance of accuracy in simultaneous translation, Mr. Leonard cited the so-called "Casablanca" incident during World War II, when the Germans learned through intelligence sources that the allies would be meeting at "Casablanca" and translated that to mean "White House." In actuality the allies met in Africa. Such a mistake by American intelligence personnel would have obviously detrimental effects on national security. The criticality of these individuals' translation skills mandates that the language instruction

be accomplished in the most pedagogically effective and efficient manner.

19. While user agencies encouraged DLI thus to increase the quantity and quality of Arabic dialect instruction in Iraqi, Egyptian and Syrian, incumbent Iraqi instructors, concerned about the effect such a policy could have on their own jobs, applied pressure in the opposite direction. For example, several Iraqis on the permanent staff filed discrimination charges against DLI, similar to the instant charge, alleging that the dialect policy was discriminatory against Iraqis. Plaintiff's husband was among those who filed such charges.

20. In an attempt to accommodate the concerns of both the user agencies and its own primarly Iraqi staff, the Arabic Department determined that it would not discharge any of the Iraqis already on the staff, but would in the future strongly prefer for employment applicants with native level proficiency in Egyptian or Syrian. Further, as an interim measure pending employment of adequate numbers of persons with native proficiency in Egyptian or Syrian, DLI offered its permanent Iraqi instructors training in Egyptian and/or Syrian dialect. Such "cross-trained" Iraqi instructors, with less than native proficiency, have over the years taught Egyptian and Syrian dialect when persons with native proficiency have been, for one reason or another, unavailable. By 1975, a substantial number of native-level Egyptian and Syrian speaking instructors had been hired, so that, in response to continuing pressure from the Iraqi staff, the hiring preference for Egyptian and Syrian native speakers was relaxed.

21. It is clear that defendant's failure to hire plaintiff in 1973, and indeed at least until relaxation of the dialect preference in 1975, was due primarily to her lack of native proficiency in either the Egyptian or Syrian dialect.

22. However, even in the absence of DLI's dialect preference it is unlikely that plaintiff would have been hired. Plaintiff and defendant presented considerable testimony regarding defendant's continued failure to hire plaintiff after 1975. In fact, plaintiff filed a separate discrimination charge in 1976 and the entire record of administrative proceedings with regard to that charge was made part of the record herein.[2] While plaintiff was considered for employment on several occasions during 1975 and thereafter, on each such occasion other candidates were considered better qualified. Plaintiff was finally hired in 1978 when more competitive candidates were unavailable.

C. *Sex Discrimination Claims*

23. As noted above, of the four temporary positions here at issue, two went to women. Further, since the effective date of Title VII approximately 15% of Arabic instructors hired have been women, and this figure is substantially consistent with the rate at which women have applied for such positions.

24. Plaintiff contends that her husband's employment by DLI was a factor in the Department's failure to hire her, and that, if true, consideration of such a factor constitutes sex discrimination.

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[2]Since the trial of this case, plaintiff has filed a separate lawsuit seeking *de novo* review of her 1976 charge. *Mahroom v. DLI*, No. C-79-1449-WHO (N.D. Cal.).

25. Defendants have for at least 12 years followed an anti-nepotism policy whereby employment of spouses within the same department is to be avoided to the maximum extent possible consistent with Civil Service rules. According to this policy, if it is determined that an incumbent employee's spouse is the best candidate for a position within the spouse's department, that person may be hired upon certification that he or she is the best candidate. In the event that the incumbent spouse of such a candidate is a supervisor who will have supervisory responsibility over the new hire, the decision to hire must be approved by the commandant or head of DLI. In other words, the anti-nepotism policy is only a factor when an individual is determined by the department chairman to be the best candidate or equal to the best candidate. Where a spouse is not determined to be the best candidate, the anti-nepotism policy has no application.

26. This policy is based on the proposition that the marital relationship often generates intense emotions which would interfere with a worker's job performance. Such emotional involvement could have detrimental effects at the work place. Another factor relevant to the policy is that employment of spouses makes it difficult to resolve grievances involving one or the other. Employment of spouses may also present problems in terms of promotion, and in terms of the administration of leave.

27. While plaintiff presented no evidence as to the relative impact of this policy on male or female job applicants at DLI, defendants presented evidence tending to show that the policy has had no adverse effect on female applicants. For exaxmple, based on a study done in July

1977, DLI found that 144, or 18%, of its employees were related. These figures included 114 husbands and wives; 75 such related employees were women. A DLI representative also testified that it was extremely seldom that an individual was disqualified from employment as a result of the anti-nepotism policy; in almost all cases, exceptions were made to enable the hiring of the best candidates.

CONCLUSIONS OF LAW

Based on the above findings, the Court concludes as follows:

1. Plaintiff's charge regarding national origin discrimination is not supported by the record. The preponderance of the evidence shows that plaintiff was not hired because of her conceded lack of native proficiency in the required dialects. Defendant's preference for native-level Egyptian and Syrian speakers was based on legitimate business concerns and sound pedagogical principles. Plaintiff has failed to show the policy was a pretext for national origin discrimination. Far from constituting discrimination against Iraqis, the policy of preferring Egyptian and Syrian speakers was administered through June 1973 by Kamil Said, Department Chairman and himself a native Iraqi.[3]

2. Further, user agencies and DLI were not directly concerned with the national origin of instructors, only with the fact of native level proficiency in the desired dialects. Thus a non-Egyptian with native proficiency in the

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[3]It is also noteworthy that even today the two Arabic Department Co-Chairmen are both Iraqi, as are two of the four department supervisors.

Egyptian dialect would receive precisely the same preference as a native Egyptian.

3. Nor has plaintiff satisfied her burden of proof, with respect to her charges of sex discrimination. The statistical evidence fails to establish that plaintiff's sex played any part in defendant's failure to hire her. Nor has plaintiff established that defendant's anti-nepotism policy was a factor affecting her employment at any time since the effective date of Title VII. The policy is based on legitimate business concerns and, at any rate, there is no evidence that it has had an adverse impact on female applicants. See, *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (C.A. 7, 1977), *cert. denied*, 435 U.S. 934.

4. The Court also concludes that, pursuant to 42 U.S.C. § 2000e-16(c), the proper party defendant herein is Clifford Alexander, the Secretary of the Army, that all other named defendants should be dismissed, and that Clifford Alexendar should be substituted therefore.

5. Finally, the Court concludes that all evidence concerning alleged discrimination against Mrs. El-Safwani, Mrs. Ibrahim, and Mr. Shammas is irrelevant to the matters considered herein and should be stricken from the record, pursuant to defendant's motions and objections at trial.

Dated: December 17, 1979

/s/ LLOYD H. BURKE
United States District Judge

APPENDIX C

Mr. Knoll
Faculty Dean
Monterey Institute of Foreign Studies
P.O. Box 1978
Monterey, Calif. 93940

Dr. Mr. Knoll,

Mrs. Adiba Mahroom was employed as a full time teacher at DLIWC in 1960, and also as a part time teacher in 1966. In both times her performance was very satisfactory. Being a graduate of the Higher Teachers Training College in Baghdad, Iraq, which trains students to become professional teachers, she is fully qualified to be a teacher as she has been trained in psychology, education, methodology and her major subject.

As her supervisor, I visited her classes several times, and observed her teaching. I found her to be a very fine teacher and her performance of high level. I highly recommend Mrs. Mahroom for any teaching job.

Yours truly,

Albert A. Daoud